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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

A. J. OSTHEIMER, 3RD and RUTH M. OSTHEIMER,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE*, ON BEHALF OF THE NATIONAL ASSOCIATION OF LIFE UNDERWRITERS

H. GILMER WELLS,
ORRIE P. STEVENS.

Counsel:
CADWALADER, WICKERSHAM & TAFT,
14 Wall Street,
New York 5, New York.

Of Counsel:
CARLYLE M. DUNAWAY, *General Counsel,*
The National Association of Life Underwriters.

June , 1959.

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BRIEF *AMICUS CURIAE*, ON BEHALF OF THE NATIONAL ASSOCIATION OF LIFE UNDERWRITERS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The National Association of Life Underwriters hereby joins with A. J. Ostheimer and Ruth M. Ostheimer, the Petitioners herein, in petitioning for a writ of certiorari to review a decision of the Court of Appeals for the Third Circuit, affirming a decision of the District Court for the Eastern District of Pennsylvania, denying refunds of the Petitioners' Federal income taxes for the years 1947, 1948 and 1949.

Consent to the filing of this brief as *amicus curiae* was granted by the Solicitor General on behalf of the Respondent in its letter dated June 9, 1959 (Appendix A). Consent was granted by the Petitioners in the letter from their counsel dated June 23, 1959 (Appendix B).

Opinions Below

The opinion of the District Court (Eastern District of Pennsylvania) is reported at 160 F. Supp. 669 (Appendix A to Petition). The decision of the United States Court of Appeals for the Third Circuit is reported at 264 F. 2d 789 (Appendix B to Petition).

Jurisdiction

The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code, 62 Stat. 928 (1948), 28 U.S.C. §1254(1).

The Question Presented

The sole question for determination is whether taxable income is realized by a life insurance agent or broker upon the purchase of policies of life insurance for his own benefit, as a result of the fact that the premiums for such policies are reduced by an amount equivalent to the commission which the agent or broker receives or would have received had policies been sold to third parties.

Statute and Regulations Involved

The only statutory provision involved in this proceeding is Section 22(a) of the Internal Revenue Code of 1939 (Int. Rev. Code of 1939, ch. 2, §22(a), 53 Stat. 9, as amended). The aforesaid statute is set forth in the Petition at page 3. No Treasury Regulation is involved.

Summary Statement of the Case

Throughout the years 1947, 1948 and 1949 the Petitioner, A. J. Ostheimer, 3rd, was a licensed life insurance "agent" and "broker" authorized to act for eleven life insurance companies. During the taxable years involved the aforesaid Petitioner purchased, and was the beneficiary of, life insurance policies on the lives of his business partner, three of his key employees, and four of his children. The Petitioner personally paid the standard premiums on all of such policies. By reason of his position as "agent" and "broker" the issuing companies subsequently paid to him amounts equivalent to the "commissions" attributable to the sale of such policies. The Petitioner did not include any of such "commissions" in his Federal income tax returns (filed jointly with his wife) for the taxable years in question. The Commissioner of Internal Revenue determined that such "commissions" constituted income and assessed deficiencies which were paid by the Petitioner. Appropriate claims for refund subsequently were filed by the Petitioner and, upon the denial thereof by the Commissioner, action was instituted by the Petitioner in the District Court.

Reasons for the Allowance of the Writ

1. The Question Presented Affects Many Taxpayers.

The National Association of Life Underwriters (the "Association"), which asks leave to appear in this proceeding as *amicus curiae*, is a non-profit trade association whose membership consists of approximately 80,000 full-time life insurance agents. The Association's records indicate that there are approximately 200,000 full-time life insurance agents in the United States. Although no exact

statistics are available, it is understood that the vast majority, if not all, of the full-time life insurance agents within the United States from time to time purchase life insurance for their own benefit upon their lives, their families' lives and the lives of their business associates. Accordingly, the question which the Court is requested to review here is one of universal interest and application to a large segment of the American taxpayers. Moreover, it may not be said that the problem is *de minimis* inasmuch as the reduction in premiums which a life insurance agent or broker obtains upon the purchase of policies for his own benefit is substantial and if such reduction were to be viewed as taxable income, as the Respondent here maintains, the tax attributable thereto would be substantial.

2. The Issue Requires a Judicial Delineation of the Scope of the Generic Concept of Taxable Income.

The decision of the Court below represents an unprecedented extension of the concept of taxable income as defined by this Court in *Eisner* v. *Macomber*, 252 U. S. 189. In essence, the Court below has determined that an individual may realize taxable income from services rendered to himself. Historically, the concept of taxable income has been limited to the gain derived from capital or labor or both combined. Prior to the decision of the Court below it has not been suggested that this concept could be extended to cover the indirect benefits inherent in one's occupation or profession. Nor has there been any suggestion that taxable income is generated by labor done or services rendered by an individual for his own benefit. May it be said that a real estate broker realizes income where by reason of his calling he is enabled to buy or sell his own home without incurring the usual broker's commissions? Similarly, does an attorney or doctor who

advises or prescribes for himself or his family incur tax liability?

Other examples of so-called inherent occupational benefits are numerous: the automobile dealer or salesman who may purchase a vehicle at a price substantially below the prevailing price to the public; the department store employee who receives the traditional employee discount upon purchases; and the farmer to whom produce is available at a price substantially below its current market price. Surely such benefits are not within the established historical concept of taxable income. Indeed, if the rationale adopted by the Court below were extended to its logical limits, practically all self-benefiting endeavor would generate taxable income irrespective of its compensatory aspects. Such a result would have the effect of a creeping paralysis upon the economy of this country and upon the initiative of its population and must be avoided.

It is therefore respectfully submitted that it is the province of this Court again to define, as was done in *Eisner* v. *Macomber, supra,* the limits beyond which the hands of the Tax Collector cannot reach.

3. The Decision of the Court Below Is in Conflict with the Decision of the Court of Appeals for the Second Circuit in *Benjamin* v. *Hoey,* 139 F. 2d 945 (1944).

In *Benjamin* v. *Hoey* the Court of Appeals for the Second Circuit was required to determine the question of the taxability of a stock broker on commissions paid to his own brokerage firm in respect of stock purchases by him for his own account. The Court there held that the broker's distributable share of such commissions did

not constitute taxable income to him. In so holding, the Second Circuit stated (p. 946):

> "If without partners, he had conducted the brokerage business, he would have paid the entire amount of those commissions to himself and no one would then have thought of saying that those payments constituted part of his taxable income. * * * [W]hat one pays to one's self cannot be part of one's income."

The only distinction between the *Benjamin* case, *supra*, and the instant situation is the immaterial difference that the former involved a stock broker while the latter involves a life insurance broker. The *Benjamin* case is therefore direct authority for the position which the Petitioners have maintained throughout these proceedings. It is submitted that the decision of the Court below is in direct conflict with the decision of the Second Circuit in the *Benjamin* case and such conflict should be resolved by this Court.

4. The Decision of the Court Below Is Erroneous as a Matter of Law.

"Commissions"[1] realized by a life insurance agent on life insurance policies which he buys for his own benefit are a reduction in the cost of the policies, realized on account of his particular occupation. These reductions-in-cost are a payment to himself and represent also an "occupational benefit" enjoyed by him because of his vocation.

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1. Because labels or semantics seem to play such a large part in the decision of this case, it is suggested that an accurate term for this benefit would be a "reduction-in-cost". To place upon these reductions-in-cost one of the labels frequently given them by the Commissioner, such as a commission, fringe benefit, bargain purchase, etc., begs the question of whether they are income to the taxpayer.

The reduction-in-cost is a payment by the agent to himself.

No court has ever held that payments to one's self constituted income. *Eisner* v. *Macomber*, 252 U. S. 189, originally defined income as any "gain derived from * * * labor." Subsequent decisions have made clear that gains or benefits produced for one's own use (as when a lawyer draws his own will) are not taxable income. *Benjamin* v. *Hoey, supra*, decided this exact question in holding that to tax a stock broker's commissions paid to his own brokerage firm in respect of stock purchases for his own account would be to tax payments made to himself.

The same result was reached in *James William Everhart*, 26 B.T.A. 318 (1932), which held nontaxable the reduction in cost realized by a salesman of participation interests in oil syndicates, when he "purchased" them for himself less his commission; in *Kenneth W. Daehler*, 31 T.C. No. 73 (1959), holding a real estate agent's "commissions" on his own purchases not taxable; and in *Sol Minzer*, 31 T.C. No. 115 (1959), discussed below, holding nontaxable an insurance agent's commissions on his own insurance.

Reduction-in-cost is a benefit occasioned by an insurance salesman's occupation.

Mr. Ostheimer was able to get this reduction-in-cost solely because of his occupation. It is inherent in his calling—the same as are free medical services to a physician, or commission-free real estate to a realtor.

In holding that insurance "commissions" on policies acquired by an insurance agent for his own benefit do not constitute taxable income, the United States Tax Court in

Sol Minzer, 31 T.C. 115 (1959) (reviewed by the whole court) stated this conclusion:

> "Of pivotal significance here is the fact that petitioner derived an economic benefit merely as an incident to his status as an insurance broker, similar to the economic benefits that might accrue to the persons described in the foregoing examples [stock broker, realtor], and the reason that such benefits are not regarded as taxable income is that they are not compensatory in nature."

It is recognized that the taxation of employer provided fringe benefits which are, and are intended to be, compensation may be justified in certain instances. Such situations are to be distinguished, however, from those non-compensatory benefits which inure to an individual solely as a result of his particular occupation, profession or calling. Any radical changes in the taxation of such latter benefits should be applied equally to all taxpayers rather than solely to insurance agents.

If the decision of the Circuit Court should stand, a serious tax discrimination would exist against life insurance agents and brokers, as contrasted with people following all other occupations (e.g. stock brokers, realtors) in substantially the same position. As was asked so directly by Judge Mulroney in his concurring opinion in *Sol Minzer*, 31 T.C. No. 115 (1959):

> "If the salesmen of property, or of insurance other than life, realize no taxable income when they buy on their own behalf, why should there be a different rule for life insurance salesmen?"

Conclusion

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

H. Gilmer Wells,
Orrie P. Stevens,
Counsel for The National Association of Life Underwriters as Amicus Curiae.

Of Counsel:
Carlyle M. Dunaway, *General Counsel,*
The National Association of Life Underwriters.

APPENDIX A

OFFICE OF THE SOLICITOR GENERAL
Washington, D. C.

H. Gilmer Wells, Esq.,
Cadwalader, Wickersham & Taft,
14 Wall Street,
New York 5, New York.

Re: *Ostheimer v. United States*

Dear Mr. Wells:

I have your letter of June 1, 1959, in which you request consent to file an *amicus* brief, on behalf of the National Association of Life Underwriters, in support of the petition for certiorari in the above-entitled case. In view of the representations contained in your letter, I am pleased to consent to your request. I am enclosing for your information a copy of a memorandum setting forth the Government's practice in matters of this kind.

Sincerely yours,

/s/ J. LEE RANKIN /by P. E.
J. Lee Rankin
Solicitor General

Enclosure

APPENDIX B

Law Offices
WHITE & WILLIAMS
19th Floor, Land Title Building,
Philadelphia 10, Pennsylvania.

June 23, 1959.

H. Gilmer Wells, Esq.,
Messrs. Cadwalader, Wickersham & Taft,
14 Wall Street,
New York 5, New York.

Dear Mr. Wells:

As counsel for Petitioners in the case of *Ostheimer* v. *United States*, No. 1014, October term 1958, we consent to your filing a brief *amicus curiae* on behalf of the National Association of Life Underwriters in favor the granting of the Petition for a Writ of Certiorari.

WHITE & WILLIAMS

s/ BERNARD V. LENTZ

By .....
Bernard V. Lentz